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4 GUSTAVO MCKENZIE,

5 Plaintiff,

6 v.

7 D. MILLER; C. NGUYEN;  
8 YAMILETH SIMMONS; N. ADAM;  
9 L. BREE; D. LAFEVER; S.  
10 PENKIAN; S. RISENHOOVER; C.  
11 RUSSELL; J. TORRANCE; J.  
12 CLARK KELSO,

13 Defendants.

14 \_\_\_\_\_ /  
15 No. C 14-4890 WHA (PR)

16 **ORDER OF SERVICE;  
17 INSTRUCTIONS TO CLERK**

18 **INTRODUCTION**

19 Plaintiff, a California prisoner proceeding pro se, filed this civil rights case under 42  
20 U.S.C. 1983 against medical personnel at Pelican Bay State Prison (“PBSP”) where he was  
21 formerly incarcerated. He is granted leave to proceed in forma pauperis in a separate order. For  
22 the reasons discussed below, the complaint is ordered served upon the other two defendants.

23 **ANALYSIS**

24 **A. STANDARD OF REVIEW**

25 Federal courts must engage in a preliminary screening of cases in which prisoners seek  
26 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
27 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims  
28 which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek  
monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro  
se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699

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1 (9th Cir. 1990).

2 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the  
3 claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the  
4 statement need only ""give the defendant fair notice of what the . . . claim is and the grounds  
5 upon which it rests."" *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citations omitted).  
6 Although in order to state a claim a complaint "does not need detailed factual allegations, . . . a  
7 plaintiff's obligation to provide the 'grounds of his 'entitle[ment] to relief' requires more than  
8 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not  
9 do. . . . Factual allegations must be enough to raise a right to relief above the speculative  
10 level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A  
11 complaint must proffer "enough facts to state a claim for relief that is plausible on its face." *Id.*  
12 at 1974.

13 To state a claim under 42 U.S.C. 1983, a plaintiff must allege two essential elements:  
14 (1) that a right secured by the Constitution or laws of the United States was violated, and (2)  
15 that the alleged deprivation was committed by a person acting under the color of state law.  
16 *West v. Atkins*, 487 U.S. 42, 48 (1988).

17 **B. LEGAL CLAIMS**

18 When liberally construed, plaintiff's allegations state cognizable claims that defendants  
19 violated his rights under the Eighth Amendment by being deliberately indifferent to his serious  
20 medical needs, and that they violated his First Amendment rights by retaliating against him for  
21 exercising such rights.

22 **CONCLUSION**

23 For the reasons set out above, it is hereby ordered as follows:

24 1. The clerk shall issue summons and the United States Marshal shall serve, without  
25 prepayment of fees, a copy of the complaint with all attachments thereto, and a copy of this  
26 order upon defendants **Nurse D. Miller; Dr. C. Nguyen; Nurse Yamileth Simmons; Dr. N.**  
27 **Adam; Nurse L. Bree; Optometrist D. Lafever; Nurse S. Penkian; Nurse Practitioner S.**  
28

United States District Court  
For the Northern District of California

1       **Risenhoover; Nurse C. Russell; and Medical Appeals Coordinator J. Torrance at Pelican  
2 Bay State Prison, and Receiver J. Clark Kelso.** A courtesy copy of the complaint with  
3 attachments and this order shall also be mailed to the California Attorney General's Office.

4           3. Defendant **shall** file an answer in accordance with the Federal Rules of Civil  
5 Procedure.

6           4. In order to expedite the resolution of this case:

7              a. No later than **91 days** from the date this order is filed, defendant shall file a  
8 motion for summary judgment or other dispositive motion. If defendant is of the opinion that  
9 this case cannot be resolved by summary judgment, he shall so inform the court prior to the date  
10 the summary judgment motion is due. All papers filed with the court shall be promptly served  
11 on the plaintiff.

12              b. Plaintiff's opposition to the dispositive motion, if any, shall be filed with the  
13 court and served upon defendant no later than **28 days** from the date of service of the motion.  
14 Plaintiff must read the attached page headed "NOTICE -- WARNING," which is provided to  
15 him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc), and  
16 *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

17              c. Defendant **shall** file a reply brief no later than **14 days** after the date of  
18 service of the opposition.

19              d. The motion shall be deemed submitted as of the date the reply brief is due.  
20 No hearing will be held on the motion unless the court so orders at a later date.

21              e. Along with his motion, defendant shall proof that they served plaintiff the  
22 *Rand* warning at the same time they served him with their motion. Failure to do so will result in  
23 the summary dismissal of their motion.

24           5. All communications by the plaintiff with the court must be served on defendant, or  
25 defendant's counsel once counsel has been designated, by mailing a true copy of the document  
26 to defendant or defendant's counsel.

27           6. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No  
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1 further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is  
2 required before the parties may conduct discovery.

3       7. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the court  
4 informed of any change of address and must comply with the court's orders in a timely fashion.  
5 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to  
6 Federal Rule of Civil Procedure 41(b).

7       IT IS SO ORDERED.

8       Dated: December 17, 2014.

*Wm Als*  
\_\_\_\_\_  
WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE

1                   **NOTICE -- WARNING (SUMMARY JUDGMENT)**

2       If defendants move for summary judgment, they are seeking to have your case  
3 dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil  
4 Procedure will, if granted, end your case.

5       Rule 56 tells you what you must do in order to oppose a motion for summary judgment.  
6 Generally, summary judgment must be granted when there is no genuine issue of material  
7 fact--that is, if there is no real dispute about any fact that would affect the result of your case,  
8 the party who asked for summary judgment is entitled to judgment as a matter of law, which  
9 will end your case. When a party you are suing makes a motion for summary judgment that is  
10 properly supported by declarations (or other sworn testimony), you cannot simply rely on what  
11 your complaint says. Instead, you must set out specific facts in declarations, depositions,  
12 answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that  
13 contradict the facts shown in the defendant's declarations and documents and show that there is  
14 a genuine issue of material fact for trial. If you do not submit your own evidence in opposition,  
15 summary judgment, if appropriate, may be entered against you. If summary judgment is  
16 granted, your case will be dismissed and there will be no trial.